

IN THE  
**Supreme Court of the United States**

October Term, 1976

No. 76-1503

Supreme Court, U. S.

JUN 21 1977

MICHAEL RODAK, JR., CLERK

THE ATCHISON, TOPEKA AND SANTA FE  
RAILWAY COMPANY, et al.,

*Appellants*

v.

THE WICHITA BOARD OF TRADE, et al.,

*Appellees*

On Appeal From The United States District Court  
For The District of Kansas

REPLY TO MEMORANDUM  
FOR THE UNITED STATES AND THE  
INTERSTATE COMMERCE COMMISSION

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**REPLY TO MEMORANDUM  
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INTERSTATE COMMERCE COMMISSION**

The Memorandum filed by the United States and the Interstate Commerce Commission seeks to raise an issue of primary jurisdiction where none exists.

1. As the decision in *United States v. Morgan*, 307 U.S. 183 makes clear, where funds are accumulated pursuant to a court order issued as an incident to review of an agency's order, the court sits as a court of equity in ordering the disposition of such funds. In exercising that jurisdiction, it

must respect the primary jurisdiction of the administrative agency to determine whether the rates were just and reasonable. But, once it has been advised by the administrative agency that the rates are lawful or unlawful, the equitable disposition of the fund is a matter entrusted to the exclusive jurisdiction of the court.<sup>1</sup> If, as the government suggests, the refunds for the period of this Court's stay were held to turn upon whether or not the Commission will grant refunds under Section 15(7) of the Interstate Commerce Act, then the conditions included in this Court's stay would be a nullity in that they would have added nothing by way of protection to the shippers that was not already available under the remedies in the Interstate Commerce Act. When this Court imposed a refund obligation as a condition of granting its stay, it knew that it was giving shippers something more than the right to go back to the Commission to follow statutory procedures which were available to them anyway.

2. The fact that the unlawful rates were in effect for a period longer than that covered by the stay order and that the Secretary of Agriculture has asked the Commission to require refunds for the entire period is immaterial. The Government seems to concede that if no such request were pending the motion to affirm should be granted. Surely, the question of primary jurisdiction does not turn on whether a proceeding is pending before the administrative agency. If the Commission had primary jurisdiction to determine how the fund collected under the Court's stay should be distributed (which it does not), then the court would have had a duty to

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<sup>1</sup>A reviewing court may grant relief which the administrative agency could not grant. *Indiana & Michigan Electric Co. v. F.P.C.*, 502 F.2d 336 (D.C. Cir.), cert. denied 420 U.S. 946.

refer the matter to the Commission, regardless of whether there was a pending proceeding.

3. The Government's argument as to primary jurisdiction would apply equally if this Court had affirmed the District Court on all grounds. In that event, the disbursement of the funds to the shippers would have followed automatically under the terms of the stay order, without awaiting the outcome of the proceeding instituted by the Secretary of Agriculture. It follows that the alleged issue of primary jurisdiction was resolved contrary to the Government's position when this Court issued its stay order.

### CONCLUSION

The Government was correct in its initial determination that "the question presented by the district court's decision . . . [is] largely *sui generis* and not likely to be of sufficient recurring importance to warrant involving this Court's mandatory appellate jurisdiction" (Memo p. 2).

Respectfully submitted,

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